No. 02-1081

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In The

Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

M&P INVESTMENTS, DAVID MUSTIN, ESTATE OF FRANK PAUL, JACK ALQUIST, GUILD CLEANERS, INC., ESTATE OF DWIGHT ALQUIST, PAUL MARIANO, VICTOR LEONARDINI, AND DELANO GOTELLI,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS GUILD CLEANERS, INC. AND JACK ALQUIST'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner City of Lodi (the "City") asks this Court to review a one-sentence order from the Ninth Circuit that finds no basis for interlocutory appellate jurisdiction over an order from the district court. That district court order analyzed an issue of California law never before ruled upon by California courts and required the parties to further brief a preliminary injunction motion in light of the district court's factual finding that the State was not, and never had been, a party to the litigation. Because of subsequent appealable orders, the same question presented to this Court is now pending before the Ninth Circuit.

(1) Did the Ninth Circuit misapply a properly stated rule of law governing interlocutory jurisdiction of the federal appellate courts when it dismissed the City's appeal for lack of jurisdiction?

(2) Should this Court step in six months before trial to decide an unresolved question of California law even though the Ninth Circuit is currently considering that question?

(3) Did the district court err in determining that the City was the real party in interest when the City concedes it does not represent the State yet sues in the name of "the People of the State of California"?

LIST OF PARTIES

Petitioner's list of parties is accurate, except for the inclusion of the Attorney General of the State of California, Bill Lockyear. The State of California has not waived its sovereign immunity and has never appeared before the U.S. District Court or the Ninth Circuit Court of Appeals in this matter.

CORPORATE DISCLOSURE

No parent or publicly held company owns 10% or more of the stock of Guild Cleaners, Inc.

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JURISDICTION

Jurisdiction over the question presented by the City's petition is pending in the Ninth Circuit. The district court issued the contested order on May 3, 2002, to facilitate its consideration of the City's motions for preliminary injunction. The Ninth Circuit Court of Appeals dismissed the appeal of that order for lack of jurisdiction on September 13, 2002, and denied Petitioner's motion for reinstatement of the appeal on November 18, 2002. On December 31, 2002, the district court issued orders on the City's two motions for preliminary injunction. Pursuant to an extension of time to file its writ petition, the City of Lodi filed its petition in this Court on January 13, 2003, four days before filing in the district court a motion for reconsideration of the same contested order. On January 30, 2003, the City filed a notice of appeal to the Ninth Circuit regarding one of the injunctive orders issued by the district court, including as an issue on appeal the identity of the real party in interest pursuing nuisance abatement claims in the name of the People of the State of California[1] – the identical issue the City asks this Court to review.

STATEMENT OF THE CASE

The City invoked the jurisdiction of the United States District Court in November 2000, filing a complaint that contained a single count seeking injunctive relief under

[1] After the City noticed an appeal to the Ninth Circuit of one of two December 31, 2002 orders on injunctive relief, the City withdrew its motion for reconsideration by the district court of its May 3, 2002 order.

the Resources Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), along with several counts seeking injunctive relief and cost recovery under state law. In April 2002, the City voluntarily dismissed its RCRA claim, and the district court exercised its discretion to retain supplemental jurisdiction over the state law claims to avoid prejudice to the parties.

The City's complaint alleged five causes of action, three for injunctive relief and two for cost recovery. The injunctive relief causes of action were brought only in the name of "the People of the State of California." The cost recovery actions were pursued only in the name of the City. Defendants Guild Cleaners, Inc. and Jack Alquist (collectively, "Guild") asserted defenses, including unclean hands, to all five causes of action and filed counterclaims against the City alleging that the City had contributed to the contamination for which it sought joint and several injunctive relief.

In Fall 2001, the City, in the name of "the People," moved for preliminary injunctive relief against Guild. That motion's prayer for relief stated: "the State requests this Court . . . issue the preliminary injunction. . . . " On December 14, 2001, the district court verbally indicated that it intended to grant an injunction to the State, took the matter under submission, and ordered further briefing on the scope and form of an order for preliminary injunctive relief. The hearing on the scope and form of the injunction was set for January 25, 2002.

Just prior to the January 25 hearing, the court received a joint letter from the California Department of Toxic Substances Control ("DTSC") and the California Regional Water Quality Control Board (the "Regional

Board"), State agencies with jurisdiction over environmental issues. The letter declared that the district court had no jurisdiction over the DTSC and the Regional Board and therefore could not bind the agencies in any preliminary injunction order.[2] In response, the district court continued the hearing on the form and scope of the order, and instead held a hearing on January 25, 2002, to determine whether the State was a party to the litigation. Following that hearing, the district court asked the parties and amicus curiae[3] to brief the issues fully.

On May 3, 2002, following further briefing and another full hearing in which the parties, the California Attorney General, and counsel for the State agencies participated, the court issued an interlocutory order, which asked: "[W]ho is the plaintiff 'People of the State of California?' Is it a party separate and distinct from the City itself?" (Pet. App. 15a.) After engaging in thoughtful analysis of the arguments presented by all parties and amicus curiae, the district court answered those questions:

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[2] The agencies stated: "DTSC and the RWQCB are not parties to the litigation, have not submitted themselves to the jurisdiction of the court, and have not waived their 11th Amendment immunity. . . . The Preliminary Injunction should not, therefore, contain language that purports to require, authorize, forbid or otherwise regulate the performance of any actions by DTSC or the RWQCB in the enforcement and oversight of proposed cleanup related activities. . . . "

[3] Amicus curiae before the district court are the DTSC, the Regional Board, and the California Attorney General. No State agency or agent has appeared in this action and, in fact, the DTSC and the Regional Board continue to assert that the federal courts have never obtained jurisdiction over any branch of California's government in regard to this case.

"[U]nder CCP § 731 the City Attorney in this case has but one client – the City of Lodi." (Pet. App. 26a.)

The district court found that the plaintiff "People of the State of California" could not be distinguished from the plaintiff "City of Lodi." Because the court's determination from the bench that injunctive relief was appropriate rested in large part upon the court's understanding that the party seeking injunctive relief was the innocent State, and not the potentially liable City, the court withdrew its December 14, 2001 oral statement regarding its intent to issue an injunction. (Pet. App. 28a.) The district court then required supplemental briefing, and reset the hearing on preliminary injunctive relief for August 9, 2002. (Pet. App. 32a-33a.)

The City appealed the district court's May 3, 2002 order to the Ninth Circuit Court of Appeals, claiming interlocutory jurisdiction based on: (1) the "dissolution" of a preliminary injunction; (2) the collateral order doctrine; and (3) the argument that the May 3, 2002 order had effectively sent a party out of court. Guild moved to dismiss the appeal, demonstrating that: (1) no preliminary injunction had ever issued and so could not be dissolved by the May 3, 2002 order; (2) the determination of the identity of a party seeking equitable relief was not collateral, but was central to the question of that party's ability to obtain injunctive relief; and (3) no party had been sent out of court. Thereafter, the Ninth Circuit dismissed the appeal for lack of jurisdiction in a one-sentence, unpublished order issued on September 13, 2002.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit Properly Dismissed the Appeal Because No Federal Statute Conferred Jurisdiction Over the May 3, 2002 Order

"A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Whether the Ninth Circuit properly dismissed the City's appeal is solely a question of whether there was a "misapplication of a properly stated rule of law." The City never claims that the Ninth Circuit applied the wrong principles of law or that incorrect statements of law were presented to that court. Instead, all the City does is repeat the arguments about jurisdiction that it made to the Ninth Circuit, the same arguments that were rejected by that court when it dismissed the City's appeal for lack of jurisdiction.

Further, the Ninth Circuit's September 13, 2002 order, from which the City petitions for review, decided only one issue: whether the Ninth Circuit had jurisdiction for review of the district court's May 3, 2002 order. The Ninth Circuit never reached the merits of the question presented by the City.

1. The Ninth Circuit's Order Does Not Determine *Any* Question of Federal Law

The City claims that review of the order is necessary and appropriate because "The Ninth Circuit's dismissal of the People's appeal decides *an important question of federal law in a way that conflicts with other appellate court decisions*." (Cert. Pet., at 5 (emphasis added).) However, the City never identifies an important question

of federal law "decided by" the Ninth Circuit's one-sentence order.

2. The Ninth Circuit's Order Does Not Conflict with the Precedents of Any Other Circuit

Although claiming there is some split among the circuit courts justifying review of this undefined federal issue, the City never cites a single case from any circuit court, including the Ninth Circuit, that conflicts with the law presented to the Ninth Circuit to support dismissal of the appeal for lack of jurisdiction.

In fact, the Ninth Circuit's one-sentence order dismissing the case for lack of jurisdiction never addressed or stated the law governing federal appellate court jurisdiction and was not published. It is hard to imagine that any federal appellate court, including the Ninth Circuit,[4] would ever cite to, reference, or rely upon the Ninth Circuit's order.

3. The Collateral Order Doctrine Did Not Confer Jurisdiction Upon the Ninth Circuit Because the Appealed Order Determined an Issue Central to the Determination of Equitable Relief, i.e., the Identity of the Plaintiff Seeking Relief

The collateral order doctrine is a limited exception to the final judgment rule. This doctrine is narrowly

[4] "Unpublished . . . orders of [the Ninth Circuit Court of Appeals] may not be cited to or by the courts of this circuit. . . . " Ninth Cir. R. 36-3(b).

interpreted, so that the exception "never be allowed to swallow the general rule" requiring a final decision of a district court as a prerequisite to jurisdiction in an intermediate appellate court. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).

The collateral order doctrine applies to "that small class [of decisions] which finally determine *claims of right separable from*, and *collateral to, rights asserted in the action*, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (emphasis added). Thus, an order is collateral *only* if it conclusively determines a disputed question, resolves an important issue, which is completely separate from the merits of the case, and is effectively unreviewable upon appeal from a final judgment. *Id.* The district court's May 3, 2002 order does not meet this test.

a. The Issue Resolved in the District Court's May 3, 2002 Order Is Inseparable from the Merits of Injunctive Relief

An order is separable under the collateral order doctrine when it is "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. An order generally is not separable if review would require appellate courts to become "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1981) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)).

In order to obtain injunctive relief, the plaintiff must demonstrate that it is likely to prevail on the merits of its claims, i.e., that it has a clear chance of demonstrating its right to relief. "The plaintiff's burden of showing a likelihood of success on the merits includes the burden of showing a likelihood that it would prevail against any affirmative defenses raised by the defendant." *Dr. Seuss Enter., L.P. v. Penguin Books*, 924 F. Supp. 1559, 1562 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997); *see also Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (recognizing affirmative defenses may affect plaintiff's showing of likelihood of success on the merits).[5] This is an inherent requirement of the plaintiff's burden to demonstrate likelihood of success on the merits, for the plaintiff is not likely to succeed on the merits if the defendant's affirmative defenses would prevent the court from granting equitable relief.

The district court's May 3, 2002 order held that the City of Lodi is the real party in interest seeking injunctive relief in the name of the People of the State of California. (Pet. App. 26a-27a.) Guild's answer to the plaintiff's complaint contains 35 affirmative defenses, including

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[5] *See also Division 580, Amalgamated Transit Union v. Central N.Y. Reg'l Transit Auth.*, 556 F.2d 659, 663-64 (2d Cir. 1977) (upholding district court's denial of injunctive relief due to application of defense of waiver); *Feliciano v. Gaztambide*, 836 F.2d 1, 2 (1st Cir. 1987) (recognizing role of affirmative defenses in showing for preliminary injunctive relief); *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 388 (Fed. Cir. 1987) ("[T]he burden is always on the movant to demonstrate entitlement to preliminary relief. Such entitlement, however, is determined in the context of the presumptions and burdens that would inhere at trial on the merits."), *overruled on other grounds, Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

several equitable affirmative defenses directly affecting the merits of the City's claims for injunctive relief, such as unclean hands, and, most notably, the impropriety of the City's attempts to avail itself of the sovereign authority of the State of California.

Guild's unclean hands defense and its counterclaims are based on the City's negligent maintenance of its sewer system, chemical dumping by City employees, and installation of a monitoring well and operation of a water supply system in a manner exacerbating existing contamination. Because no one has accused the State of California of contributing to the contamination in the City of Lodi, by purporting to represent the State (or some other nebulous, never-before-recognized "virtual" party it calls "the People"), the City effectively shielded itself from any equitable defense.

These defenses demonstrate how the issues addressed in the May 3 order are inseparable from the merits of the City's claims. The May 3 order determined that the City could not cloak itself in the sovereignty of the State of California, that in fact the City was the party seeking injunctive relief. In effect, the district court determined that Guild's affirmative defenses had merit and should be considered in assessing equitable relief.

The susceptibility of a party seeking a preliminary injunction to equitable defenses that preclude a grant of injunctive relief directly impacts the adjudication of the underlying claims for equitable relief. Even the City recognizes that the determination of the identity of the party seeking equitable relief is inseparable from the merits of the determination of injunctive relief: "As an equitably innocent party against whom no counterclaims

have been asserted, the People's ability to obtain injunctive relief and to impose joint and several liability was unquestioned. That is not necessarily so for the City of Lodi however." (Cert. Pet., at 6 n.1.)

The determination of the identity of a party seeking equitable relief is in no way, in the language of *Cohen*, 337 U.S. at 546, "independent of the cause itself." Rather, to review this determination, the Ninth Circuit necessarily would have become "enmeshed in the factual and legal issues" surrounding the City's claims for injunctive relief. *Coopers & Lybrand*, 437 U.S. at 469. Thus, the district court's May 3, 2002 order determining the identity of the party seeking equitable relief is not separable, not collateral, and not immediately appealable.

b. The Collateral Order Doctrine Did Not Confer Jurisdiction on the Ninth Circuit Because the District Court's Order Was Effectively Reviewable Absent Immediate Appeal

An order is effectively unreviewable absent immediate appeal only if lack of immediate appeal would destroy the legal and practical value of an asserted right, "where denial of immediate review would render impossible any review whatsoever." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)); *United States v. Ryan*, 402 U.S. 530, 533 (1971)).

Considering, however, that the issue of the real party in interest on the "People's" injunctive claims is *currently pending* before the Ninth Circuit Court of Appeals, any

claim that the May 3, 2002 order was effectively unreviewable absent immediate appeal is demonstrably false.

4. The May 3, 2002 Order Did Not Send a Party Out of Court: "The People's" Motion for Injunctive Relief Has Since Been Granted by the District Court

The City argues that the "Plaintiff People of the State of California" was effectively "sent out of court" by the May 3 order. The City seems to be referring to a practical interpretation sometimes given to the final judgment rule of 28 U.S.C. section 1291. But a "final decision" is one that "ends the litigation on its merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

The cases cited by the City fit squarely within this definition. *See Wakefield v. Thompson*, 177 F.3d 1160, 1162-63 (9th Cir. 1999); *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 746-47 (9th Cir. 1993); *United States v. Lee*, 786 F.2d 951, 956 (9th Cir. 1986); *Herrington v. County of Sonoma*, 706 F.2d 938, 939 (9th Cir. 1983). In each of those cases, an order of dismissal effectively removed both a party *and all of that party's claims* from federal court without possibility of pursuing the claims or challenging an order absent immediate appeal. That is not the situation before this Court.

After the City conceded below that it did not represent the State, the district court made a determination that the party who had pursued injunctive relief was in fact the City of Lodi rather than an amorphous "all of the People of the State of California," an entity, which, according to the City, is *neither* the City of Lodi *nor* the State of California.

(Pet. App. 18a.) But the district court did *not* dismiss any claim in the action based on its determination of the real party in interest, nor did it even require the City to formally substitute itself as the party pursuing injunctive relief. The court merely corrected its earlier misapprehension that the party identified in the case caption, "the People of the State of California," was the State of California. In fact, on December 31, 2002, with full knowledge that the moving party on preliminary injunctive relief, captioned as "the People of the State of California," was the City of Lodi, the district court *granted* the preliminary injunctive relief sought by the City.[6]

And while the City claims that the Ninth Circuit's dismissal effectively sent "the People" out of court, the City ignores that there are other public prosecutors who can intervene in this action or who can take independent action to vindicate the rights of California's public at large, any of whom also can prosecute the action in the name of "the People of the State of California." In fact, as demonstrated by the California agencies' communication to the parties,[7] the State of California, including California's Attorney General, are well aware of the proceedings in

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[6] It is surprising that the City continues to assert that a party has been sent out of court, for that effectively concedes that no party before the district court can enforce the injunctive relief so recently awarded to "the People."

[7] *See supra* note 2 and accompanying text. Following issuance of the district court's May 3, 2002 order, the Regional Board again communicated with the district court, assuring the court that that agency was actively monitoring the progress of cleanup efforts in Lodi and could and would issue cleanup orders if any potentially responsible party, including the City, was not appropriately and voluntarily participating in cleanup efforts.

this matter and, if any agent of California determines that urgent action is necessary, he or she can, and will, represent "the People," either in the district court, through intervention, or in another forum.

The City is currently and actively pursuing permanent injunctive and monetary relief in the district court, on the same claims and allegations upon which it initiated this litigation. The May 3 order was issued as an integral but preliminary part of the on-going proceedings. Thus, the City's claim that the final judgment rule or any of its interpretations conferred jurisdiction upon the Ninth Circuit is facially absurd.

B. This Court Should Deny the City's Petition for a Writ of Certiorari Because the Order Appealed from Is Interlocutory

"[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Amer. Constr. Co. v. Jacksonville, T.&K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1918). The lack of a final judgment is alone "sufficient ground for the denial of the application" for certiorari review. *Id.*; *see also Bhd. of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (finding a case remanded by the circuit court was not ripe for review by the U.S. Supreme Court).

To date, the City of Lodi has initiated four interlocutory appeals to the Ninth Circuit Court of Appeals. Trial in

this matter is not slated to begin until September 22, 2003. All the Ninth Circuit was asked to do was reverse the district court's determination that the City of Lodi was the real party in interest and "reinstate" preliminary injunctive relief[8] that the City contended had been granted by the district court. Under any outcome at the Ninth Circuit, dismissal for lack of jurisdiction, or consideration upon the merits and affirmance or reversal of the district court's order, the underlying action would have continued to trial on the merits and ultimate determination of the rights of the parties. There is no better example of an interlocutory order than the order the City asks this Court to review.

C. Reviewing the District Court's Order Would Require this Court to Review a Fact-Specific Order Interpreting State Law, Although the Same Order Has Not Been Previously Reviewed in Any State or Federal Court and the Same Issues Are Currently Before the Ninth Circuit Court of Appeals for Review on the Merits

The only conceivable federal question presented by the City is whether "the People," as defined by the City, is a real party in interest under Federal Rule of Civil

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[8] At the Ninth Circuit, the City cited 28 U.S.C. section 1291(a)(1) as the basis for the Ninth Circuit's jurisdiction. Guild moved for dismissal citing the only order entered after hearing on the City's motion for preliminary injunction, which reflected that the district court had taken the matter under submission, but had not ruled on the motion. The City has apparently abandoned its argument that the May 3, 2002 order conferred jurisdiction upon the Ninth Circuit under 28 U.S.C. section 1291(a)(1).

Procedure 17(a). However, as the City concedes, that determination is made under the "relevant substantive law," federal or state, that gives rise to the cause of action. (Cert. Pet., at 5.) The City seeks injunctive relief only under state nuisance law. Thus, the resolution of the issues involved in the City's petition for review requires interpretation of state law. A brief review of the City's Table of Authorities, which cites 68 sections of California law, but only three sections of federal law and one federal rule, demonstrates the state-law nature of the determinations at issue.

1. The District Court's Order Relied Upon Fact-Specific Determinations of the Actions and Motivations of the City of Lodi in Presenting Itself as the State of California

"A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . . " Sup. Ct. R. 10. The issue determined by the district court's May 3, 2002 order was whether the plaintiff "People of the State of California" was an entity separate and distinct from the City of Lodi, based upon a review of both state law and the facts before the district court. The City conceded that it did not represent the State of California and proposed instead that it represented "all of the People of the State of California." The district court framed the issue:

> [W]hen suit is brought under [California Code of Civil Procedure section] 731 "in the name of the people of the State of California," there are only *two* possible conclusions: (1) the plaintiff is the city which the city attorney represents or (2) the plaintiff is the State of California (a position no

> one urges herein). Nevertheless, the Plaintiff People assert a third option – that the plaintiff is simply "all of the people" in the State (separate and apart from the State and the City of Lodi).

(Order, Pet. App. 25a.)

In determining that the City's position was without merit, the district court relied on the following factual findings:[9]

- The City Council of Lodi, not the people of California, directed the filing of the action.
- The City, not the people of California, financed the litigation.
- The City, not the people of California, directed the litigation.
- Any counterclaims asserted against the "People" would in fact be claims against the City, particularly since service would be effected upon the City.
- Any award of damages, costs or sanctions against "the People" would be paid by the City.
- Any award of injunctive relief would bind the City and not the "people of California."

These findings were predicated upon voluminous evidence presented to the district court and oral testimony of the City's attorneys during hearing on the matter. Any review by this Court would necessarily enmesh the Court

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[9] *See* Petitioner's Appendix at 25a-26a for the district court's findings.

in a determination of whether the factual findings made by the district court were accurate and were sufficient to support a determination that the City of Lodi – not some fictional, innocent party – sought injunctive relief.

2. The City Has Requested Review of a State Law Determination Before the Ninth Circuit Court of Appeals Has Considered this Issue on Its Merits

Ordinarily, this Court "accepts" and therefore does not review "save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Although this Court clearly has the authority to review state-law determinations by lower federal courts, in the vast majority of cases this Court declines to do so because: "The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we [this Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 57-58 (1979); *see also The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) ("[W]e ordinarily will not consider such a state-law issue, and we decline to do so here.").

The May 3, 2002 order of the district court represents an analysis of California law in a situation of first impression – the attempt by a municipal corporation to use California Code of Civil Procedure section 731 to avoid equitable defenses by claiming to represent "the state sovereign," an entity that the City concedes is not the State of California but contends is not the City of Lodi.

The Ninth Circuit's only comment on the appeal did not reach the merits – instead it properly dismissed the appeal as a premature attempt to invoke appellate jurisdiction. However, in the period following the Ninth Circuit's dismissal of the City's appeal of the May 3, 2002 order, the district court issued two orders on the City's two separate motions for preliminary injunctive relief. One motion was granted, the other denied. The City has appealed the denial of one of its motions and has raised as an issue to the Ninth Circuit: "Who is the 'real party in interest' pursuant to Federal Rule of Civil Procedure 17(a) for the People of the State of California's public nuisance abatement claims?"

Thus, the City requests review by this Court of a question that has never been addressed by any intermediate federal appellate court and is currently before the only federal appellate court likely to consider this question of interpretation of California law – the Ninth Circuit Court of Appeals. Review by this Court prior to analysis by the Ninth Circuit would deprive this Court of the benefit of additional analysis that might aid the determination of the merits.

3. No Lower Court Has Acted in Any Fashion Requiring this Court to Invoke Its Supervisory Powers

The City claims that the district court's May 3, 2002 order represents "such a departure from the accepted and usual course of judicial proceedings . . . as to call for an

exercise of this Court's supervisory power."[10] (Cert. Pet., at 8.) The City then proceeds to analyze the issue as a matter of erroneous interpretation of state law. The City does not dispute the district court's jurisdiction over the parties. The City does not dispute the authority of the district court to analyze and interpret a state-law issue properly before it, particularly in the absence of any on-point opinion from any California court. The City does not claim that the district court deprived it of notice and an opportunity to be heard on the issues. The City does not claim *any* error on the part of the district court, except that the City disagrees with the conclusions reached by that court's May 3, 2002 opinion. How any of this rises to the level of a departure from "the accepted and usual course of judicial proceedings" that is so significant as to require intervention by the highest Court in the United States is unclear.

Generally, invocation of this Court's supervisory power is indicated when a lower federal court acts outside of its power or jurisdiction or misconstrues federal procedural rules. *See, e.g., Grupo Mexicano de DeSarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (power to issue preliminary injunction to prevent asset transfer where plaintiff did not claim lien or equitable interest); *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976) (district courts' authority to remand diversity cases for reasons other than those expressed by statute); *Bruner v. United States*, 343 U.S. 112 (1952) (jurisdiction of lower federal courts over specific statutory claims). Here, the district court's May 3, 2002 order was a sub-part of the

[10] Sup. Ct. R. 10(a).

court's consideration of a routine motion for injunctive relief.

No one has contended that the district court lacked the power or jurisdiction to clarify the identity of the party seeking injunctive relief. And while the district court cited Federal Rule of Civil Procedure 17(a), that court properly identified the real party in interest by analyzing the *state* law governing the substantive right to relief. The application of state law to the identification of parties does not justify the exercise of this Court's supervisory power.

D. The District Court's May 3, 2002 Order Was a Valid Interpretation of State Law

The City's petition for a writ of certiorari focuses on the perceived errors in the district court's analysis. Although citing a great deal of California case law in support of its position, the City misses two crucial points.

First, the City fails to acknowledge that it *conceded* that it did not represent the State, but argued that as "the People," it did not represent the City, either. None of the cases cited by the City support the proposition that there is a third, amorphous entity, neither City nor State, that can be represented by a public prosecutor under California Code of Civil Procedure section 731.

Second, there is no precedent, cited or otherwise, for use by a public prosecutor of California nuisance law to shield his or her municipality from potential liability for contributing to the very nuisance it asks the court to abate by taking on the equitably innocent mantle of "the People." This was a case of first impression, not surprisingly, and the district court used pertinent California precedent to

determine what California courts would decide in the same circumstances.

Faced with an issue of first impression under California law, the district court thoughtfully and appropriately analyzed the precedent presented and the arguments of the parties and amicus curiae, and reached a decision on the merits that was consistent with all published decisions of California courts. If a novel interpretation of *state law* is what the City seeks, its arguments should be squarely presented to *state courts*.

E. The City's Petition for a Writ of Certiorari Contains Legal and Factual Misstatements Bearing on the Issues Properly Before the Court if Certiorari Is Granted

Under Supreme Court Rule 15, an opposition to a petition for writ of certiorari "should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. Honoring that rule, Guild identifies the following list of factual misstatements in the petition. Guild notes that the common feature of the listed misstatements is that, although they are presented in the Petition as conclusions of fact, they actually represent hotly contested and unresolved issues that will not be decided before the September 2003 trial. If this Court accepts review, it will necessarily be enmeshed in the considerable quantity of evidence and argument regarding these points.

- There is a significant dispute over whether the City has resolved its liability for contribution to the contamination at issue by entering

a settlement agreement with only one state agency and whether, in any event, settlement of liability equates to equitable innocence.

- The City states, as if it has been proven, that Defendant Guild Cleaners, Inc. is "at the center of and primarily responsible for the contamination." Guild in fact strongly contests its alleged liability. Further, there are *many* other parties, including the City, whose contributions to the contamination are at issue and much of the contamination in the City of Lodi is found in locations distant from the Guild facility.

- The "hot spot"[11] of contamination referenced by the City is not, in fact, "next to" the Guild facility. The "hot spot" is located approximately 80 feet to the west of Guild Cleaners, Inc., directly south of a property formerly used as a newspaper printing facility that used and disposed of the contaminants at issue. Following extensive discovery among the more than 100 parties, the relative liability of Guild, the City, the newspaper and others will be the subject of trial.

- Although the City claims that the City Council directed the City Attorney to bring public nuisance claims against the defendants below,

[11] "Hot spot" is a term coined by the City. Its exact meaning is unclear, and so the existence of a "hot spot" is also an issue of contention below.

nothing in the record has ever demonstrated any such direction by the City Council.

CONCLUSION

The City of Lodi has attempted to invoke the jurisdiction of this Court over an interlocutory order analyzing a combination of facts and state law that has never been ruled upon by any California or federal court other than the district court below. Further, the issue is wholly one of California law that will impact only parties in California. For these reasons, and because the issue is currently pending before the Ninth Circuit, the City's petition for a writ of certiorari should be denied.

Respectfully submitted,

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